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Danial Mah bin Abdullah v Public Prosecutor

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HIGH COURT (KOTA KINABALU) — NOTICE OF MOTION NO LBN-44–2–12 OF 2023
ZALEHA ROSE J
26 APRIL 2024

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Criminal Procedure — Charge — Defective charge — Charges under charges under s 23(1) of Malaysian Anti-Corruption Commission Act 2009 — Whether there were no particularisation of offence committed or charged — Whether charges gave sufficient notice of offence committed — Whether errors or omissions in charges an irregularity — Whether defects in charges curable — Whether there was miscarriage of justice — Whether charges bad in law — Whether charges ought to be set aside or struck out

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The applicant was charged by the Session Court of Labuan with two charges under s 23(1) of the Malaysian Anti-Corruption Commission Act 2009 ('the MACC Act'). The first charge was for the offence of using his office or position for any gratification for himself by payments of RM20,225 to Asas Jaya Enterprise for the construction and completion of a toilet, cleaning of a store, door installation and other works at his private residence. The second charge was for the offence of using his office or position for any gratification for himself by payments of RM5,800 to Serba Setia for the supply and security door installation at his private residence. The applicant argued that the charges preferred against him were defective by reason of no particularisation of the offence committed or charged with and therefore, the charges were bad in law as they contravened: (a) ss 152 and 154 of the Criminal Procedure Code ('the CPC'); (b) ss 3 and 23(1) of the MACC Act; and (c) arts 5 and 8 of the Federal Constitution ('the FC'). Hence, vide a notice of motion in encl 1, the applicant sought orders that: (i) both charges be set aside or struck out; (ii) the applicant be discharged and acquitted from all of the criminal charges preferred against him; or (iii) in the alternative, the criminal charges and the entire criminal proceedings be stayed permanently.

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Held, dismissing application:

(1) The first charge had stated that the applicant as the Head of Director of LFSA had used his office or position for any gratification for himself by payment of RM20,225 to Asas Jaya Enterprise for 'bagi kerja-kerja membina dan menyiapkan tandas, membersihkan stor, memasang pintu serta kerja-kerja yang lain' at his private residence. Whilst second charge stated that the applicant as the Head of Director of LFSA had used his

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office or position for any gratification for himself by payment of RM5,800 to Serba Setia for 'supply and install security door' at his private residence. Hence, the charges also gave sufficient notice as to the offence committed by referring to the element stated in s 23(1) of the MACC Act. Both of the charges were not misleading as it already mentioned the applicant's position, for whom the gratification was for, the manner and gratification involved (see paras 53 & 55).

(2) As far as the question whether the gratification in the aforesaid charges were gratification under the MACC Act, the court agreed with the respondent that they fell under 'property or interest in property being property of any description whether movable or immovable' under limb (a) of s 3 of the MACC Act. The fixture of doors and all the other works done to the applicant's private residence was immovable as the residence itself was a property that was firmly fixed into the grounds and could not be moved. When the works and installation were completed, then the doors and any other works done to the applicant's private residence was fixed into his private residence and became one of his properties. Thus, the charges had fulfilled the requirements of ss 152 and 153 of the CPC as well as ss 3 and 23(1) of the MACC Act. In the circumstances, the charges were not defective in law and the applicant had been given sufficient notice as to the offences he was charged with. Further, there was no contravention of arts 5 and 8 of the FC (see paras 56, 59, 72 & 75).

(3) The manner the applicant used his position, either by making decisions or taking actions in the charge, if any, was only an irregularity curable under s 156 of the CPC and would not cause a miscarriage of justice to the applicant. As such, omission of the fact alone could not conclude that the charge was defective in law. Further, the errors or omissions in the charge was only an irregularity which could not affect any decision unless it caused a miscarriage of justice as stated in s 422 of the CPC. The prosecution at all times had the rights to apply to the court to amend the charge. Hence, this was not a case that warranted the court to exercise its inherent power (see paras 77–78 & 80–82).

[Bahasa Malaysia summary

Pemohon dituduh di Mahkamah Sesyen Labuan atas dua pertuduhan di bawah s 23(1) Akta Suruhanjaya Pencegahan Rasuah Malaysia 2009 ('Akta SPRM'). Pertuduhan pertama adalah atas kesalahan menggunakan jawatan atau kedudukannya untuk suapan terhadap dirinya sendiri dengan bayaran sebanyak RM20,225 kepada Asas Jaya Enterprise untuk pembinaan tandas, pembersihan kedai, pemasangan pintu dan kerja-kerja lain di kediaman persendiriannya. Pertuduhan kedua adalah atas kesalahan menggunakan jawatan atau kedudukannya untuk suapan terhadap dirinya sendiri dengan membayar RM5,800 kepada Serba Setia untuk membekalkan dan memasang pintu keselamatan di kediaman persendiriannya. Pemohon menghujahkan

bahawa pertuduhan yang dikenakan terhadapnya adalah defektif kerana tiada perincian kesalahan yang dilakukan untuk pertuduhan tersebut dan oleh itu, salah menurut undang-undang kerana bertentangan dengan: (a) ss 152 dan 154 Kanun Tatacara Jenayah ('KTJ'); (b) ss 3 dan 23(1) Akta SPRM; dan (c) perkara5 dan 8 Perlembagaan Persekutuan ('PP'). Oleh itu, melalui notis usul dalam lamp 1, pemohon memohon perintah bahawa: (i) kedua-dua pertuduhan tersebut diketepikan atau dibatalkan; (ii) pemohon dilepaskan dan dibebaskan daripada semua pertuduhan jenayah yang dikenakan terhadapnya; atau (iii) sebagai alternatif, pertuduhan jenayah dan keseluruhan prosiding jenayah ditangguhkan secara kekal.

Diputuskan, menolak rayuan:

(1) Pertuduhan pertama menyatakan bahawa pemohon selaku Ketua Pengarah LFSA telah menggunakan jawatan atau kedudukannya untuk suapan untuk dirinya sendiri dengan membayar RM20,225 kepada Asas Jaya Enterprise untuk 'kerja-kerja membina dan menyiapkan tandas, membersihkan stor, memasang pintu serta kerja-kerja yang lain' di kediaman persendiriannya. Manakala pertuduhan kedua menyatakan bahawa pemohon selaku Ketua Pengarah LFSA telah menggunakan jawatan atau kedudukannya untuk suapan terhadap dirinya sendiri dengan membayar RM 5,800 kepada Serba Setia untuk 'membekalkan dan memasang pintu keselamatan' di kediaman peribadinya. Justeru, pertuduhan-pertuduhan tersebut memberi notis yang mencukupi mengenai kesalahan yang dilakukan dengan merujuk kepada elemen yang dinyatakan dalam s 23(1) Akta SPRM. Kedua-dua pertuduhan itu tidak mengelirukan kerana ianya telah menyebut kes pemohon, untuk siapa suapan itu, cara dan ganjaran yang terlibat (lihat perenggan 53 & 55).

(2) Persoalan sama ada suapan dalam pertuduhan yang disebutkan di atas adalah suapan di bawah Akta SPRM, mahkamah bersetuju dengan responden bahawa ianya termasuk di bawah 'harta atau kepentingan mengenai harta, iaitu apa-apa jenis harta, sama ada alih atau tak alih' di bahagian (a) s 3 Akta SPRM. Lekapan pintu dan semua kerja lain yang dilakukan di kediaman persendirian pemohon merupakan harta tak alih kerana kediaman itu sendiri adalah harta yang tak alih dan tidak boleh dipindahkan. Apabila kerja-kerja dan pemasangan selesai, maka pintu dan sebarang kerja-kerja lain yang dilakukan di kediaman persendirian pemohon telah dipasang ke dalam kediaman persendiriannya dan menjadi salah satu hartanya. Justeru, pertuduhan-pertuduhan tersebut telah memenuhi keperluan ss 152 dan 153 KTJ serta ss 3 dan 23(1) Akta SPRM. Dalam keadaan itu, pertuduhan-pertuduhan itu tidak defektif dari segi undang-undang dan pemohon telah diberi notis yang mencukupi mengenai kesalahan yang dikenakan kepadanya.

Selanjutnya, tiada pelanggaran perkara5 dan 8 PP (lihat perenggan 56, 59, 72 & 75).

(3) Cara pemohon menggunakan kedudukannya, sama ada dengan membuat keputusan atau mengambil tindakan dalam pertuduhan, sekiranya ada, hanyalah kesilapan yang boleh dipulihkan di bawah s 156 KTJ dan tidak akan menyebabkan kesilapan keadilan kepada pemohon. Oleh itu, peninggalan fakta itu sahaja tidak dapat menyimpulkan bahawa pertuduhan itu defektif dari segi undang-undang. Selanjutnya, kesilapan atau peninggalan dalam pertuduhan itu hanyalah kesilapan yang tidak boleh menjejaskan sebarang keputusan melainkan terdapat kesilapan keadilan seperti yang dinyatakan dalam s 422 KTJ. Pendakwaan pada setiap masa mempunyai hak untuk memohon kepada mahkamah untuk meminda pertuduhan itu. Oleh itu, ini bukanlah kes yang mewajarkan mahkamah untuk menggunakan kuasa sedia ada (lihat perenggan 77–78 & 80–82).]

Cases referred to

Ahmad Zubair @ Ahmad Zubir bin Hj Murshid v PP [2014] 6 MLJ 831; [2014] 9 CLJ 289, FC (refd)

Dato' Sri Mohd Najib bin Hj Abd Razak v PP [2022] 1 MLJ 137; [2022] 1 CLJ 491, CA (folld)

Karpal Singh & Anor v PP [1991] 2 MLJ 544; [1991] 2 CLJ 1458; [1991] 1 CLJ Rep 183, SC (refd)

Kerajaan Malaysia v Mat Shuhaimi bin Shafiei [2018] 2 MLJ 133; [2018] 3 CLJ 1, FC (refd)

Mahiaddin Md Yassin v PP [2023] MLJU 2008; [2023] 8 CLJ 756, HC (distd)

Mohd Haikal bin Mohd Khatib Saddaly & Ors v PP [2009] 4 MLJ 305; [2011] 5 CLJ 369, CA (refd)

PP v Arul Kanda a/l Kandasamy and another case [2023] 10 MLJ 342; [2023] 3 CLJ 770, HC (refd)

PP v Dato' Sri Mohd Najib bin Hj Abd Razak [2020] 11 MLJ 808; [2020] 8 CLJ 319, HC (refd)

Ravindran a/l Ramasamy v PP [2015] 6 MLJ 509; [2015] 3 CLJ 421, FC (refd)

Rosli bin Yusof v PP [2021] 4 MLJ 479, FC (refd)

Siti Aishah bt Sheikh Abd Kadir v PP [2013] 6 MLJ 86; [2014] 1 CLJ 1058, CA (refd)

Thomas @ Severinus bin Kandadi v PP [2009] 7 MLJ 803; [2009] 7 CLJ 561, HC (refd)

Legislation referred to

Criminal Procedure Code ss 152, s 153, 154, 156, 173(g), 422

Federal Constitution arts 5, 8

Malaysian Anti-Corruption Commission Act 2009 ss 3, 3(a), 23(1), (2)

Iskandar Putra Ishak (Iskandar Putra & Izral) for the applicant.
Nurul Izzati bt Sapifee (Deputy Public Prosecutor, Malaysian Anti-Corruption Commission (MACC)) for the respondent.

Zaleha Rose J:

INTRODUCTION

[1] This in an application by the applicant vide the notice of motion dated 7 December 2023 (encl 1) praying for the following order:

(a) that both charges that the respondent as the public prosecutor had on the 21 September 2023 preferred against the applicant in Session Court of Labuan under Criminal Trial No LBN-61R-1–09 of 2023 to be set aside or struck out; and

(b) that thereby the applicant be discharged and acquitted from all of the abovementioned criminal charges that the respondent had preferred against him on the 21 September 2023 in the Session Court of Labuan WP under the Criminal Trial No LBN-61R-1–09 of 2023; or

(c) that in the alternative, thereby all of the abovementioned criminal charges that the respondent had preferred against the applicant on the 21 September 2023 under the Criminal Trial No LBN-61R-1–09 of 2023 and the entire criminal proceedings pertaining to the same to be stayed permanently.

[2] The notice of motion is supported by the affidavit in support affirmed by Danial Mah bin Abdullah on 6 December 2023 (encl 2).

[3] In essence, the applicant's argument is founded on the premise that the charges preferred against him are defective in substance and form, and bad in law as they contravene:

(a) ss 152 and 154 of the Criminal Procedure Code ('the CPC');

(b) ss 3 and 23(1) of the MACC Act 2009; and

(c) arts 5 and 8 of the Federal Constitution.

RELEVANT FACTS

[4] On 21 September 2023, the applicant was charged by the Sessions Court of Labuan under the Criminal Trial No LBN-61R-1–09 of 2023 with two charges under s 23(1) of the Malaysian Anti-Corruption Commission Act 2009 ('the MACC').

[5] The charges preferred against the applicant are:

(a) pertuduhan pertama:

> Bahawa kamu, di antara 29 November 2017 dan 18 Mei 2018, di Pejabat Labuan Financial Services Authority (LFSA), Tingkat 17, Menara Ujana Kewangan, Jalan Merdeka, di dalam Wilayah Persekutuan Labuan, sebagai seorang pegawai badan awam iaitu Ketua Pengarah LFSA, telah menggunakan jawatan kamu untuk suatu suapan bagi diri kamu sendiri, iaitu pembayaran berjumlah RM 20,225.00 kepada Asas Jaya Enterprise bagi kerja-kerja membina dan menyiapkan tandas, membersihkan stor, memasang pintu serta kerja-kerja yang lain di kediaman persendirian kamu, oleh yang demikian kamu telah melakukan suatu kesalahan di bawah seksyen 23(1) Akta Suruhanjaya Pencegahan Rasuah Malaysia 2009 (Akta 694) yang boleh dihukum di bawah seksyen 24(1) Akta yang sama.
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> Hukuman: Penjara tidak lebih dua puluh tahun dan denda tidak kurang daripada lima kali ganda jumlah atau nilai suapan yang menjadi hal perkara kesalahan itu jika suapan itu dapat dinilai atau berbentuk wang, atau sepuluh ribu ringgit, mengikut mana-mana yang lebih tinggi.

(b) pertuduhan kedua:

> Bahawa kamu, di antara 14 September 2020 dan 26 Januari 2021, di Pejabat Labuan Financial Service Authority (LFSA), Tingkat 17, Menara Ujana Kewangan, Jalan Merdeka, di dalam Wilayah Persekutuan Labuan, sebagai seorang pegawai badan awam iaitu Ketua Pengarah LFSA, telah menggunakan jawatan kamu untuk suatu suapan bagi diri kamu sendiri, iaitu pembayaran berjumlah RM 5,800.00 kepada Serba Setia bagi kerja-kerja 'supply and install security door' di kediaman persendirian kamu, oleh yang demikian kamu telah melakukan suatu kesalahan di bawah seksyen 23(1) Akta Suruhanjaya Pencegahan Rasuah Malaysia 2009 (Akta 694) yang boleh dihukum di bawah seksyen 24(1) Akta yang sama.
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> Hukuman: Penjara tidak lebih dua puluh tahun dan denda tidak kurang daripada lima kali ganda jumlah atau nilai suapan yang menjadi hal perkara kesalahan itu jika suapan itu dapat dinilai atau berbentuk wang, atau sepuluh ribu ringgit, mengikut mana-mana yang lebih tinggi.

[6] The relevant cause papers filed and exchanged in light of this application are:

(a) the applicant's notice of motion dated 7 December 2023 ('encl 1');

(b) the applicant's affidavit in support affirmed by the applicant himself on the 6 December 2023 ('encl 2');

(c) the respondent's affidavit in reply affirmed by a deputy public prosecutor, namely Nurul Izzati bt Sapiee, on 9 January 2024 ('encl 3'); and

(d) the applicant's affidavit in reply affirmed by the applicant himself on the 23 January 2024 ('encl 4'). A

THE RELEVANT LAW

[7] It is imperative to reproduce the relevant law herein: B

(a) s 152 of the Criminal Procedure Code:

152 Form of charge

(1) Every charge under this Code shall state the offence with which the accused is charged. C

(2) If the law which creates the offence gives it any specific name the offence may be described in the charge by that name only.

(3) If the law which creates the offence does not give it any specific name so much of the definition of the offence must be stated as to give the accused notice of the matter with which he is charged. D

(4) The law and section of the law against which the offence is said to have been committed shall be mentioned in the charge.

(5) The fact that the charge is made is equivalent to a statement that every legal condition required by law to constitute the offence charged was fulfilled in the particular case. E

(6) ...

(b) s 153 of the Criminal Procedure Code: F

153 Particulars as to time, place and person

(1) The charge shall contain such particulars as to the time and place of the alleged offence and the person, if any, against whom or the thing, if any, in respect of which it was committed as are reasonably sufficient to give the accused notice of the matter with which he is charged. G

(c) s 154 of the Criminal Procedure Code:

154 When manner of committing offence must be stated

When the nature of the case is such that the particulars mentioned in sections 152 and 153 do not give the accused sufficient notice of the matter with which he is charged, the charge shall also contain such particulars of the manner in which the alleged offence was committed as will be sufficient for that purpose. H

(d) s 156 of the Criminal Procedure Code: I

156 Effect of errors.

No error in stating either the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars shall be

regarded, at any stage of the case, as material unless the accused was in fact misled by that error or omission.

(e) s 422 of the Criminal Procedure Code:

422 Irregularities not to vitiate proceedings.

Subject to the provisions contained in this Chapter no finding, sentence or order passed or made by a Court of competent jurisdiction shall be reversed or altered on account of —

(a) any error, omission or irregularity in the complaint, sanction, consent, summons, warrant, charge, judgment or other proceedings before or during trial or in any inquiry or other proceeding under this Code;

(b) the want of any sanction; or

(c) the improper admission or rejection of any evidence, unless such error, omission, irregularity, want, or improper admission or rejection of evidence has occasioned a failure of justice.

(f) s 3 of the MACC Act 2009:

3 Interpretation

In this Act, unless the context otherwise requires —

...

'property' means real or personal property of every description, including money, whether situated in Malaysia or elsewhere, whether tangible or intangible, and includes an interest in any such real or personal property;

...

'gratification' means—

(a) money, donation, gift, loan, fee, reward, valuable security, property or interest in property being property of any description whether movable or immovable, financial benefit, or any other similar advantage;

(b) any office, dignity, employment, contract of employment or services, and agreement to give employment or render services in any capacity;

(c) any payment, release, discharge or liquidation of any loan, obligation or other liability, whether in whole or in part;

(d) any valuable consideration of any kind, any discount, commission, rebate, bonus, deduction or percentage;

(e) any forbearance to demand any money or money's worth or valuable thing;

(f) any other service or favour of any description, including protection from any penalty or disability incurred or apprehended or from any action or proceedings of a disciplinary, civil or criminal nature, whether or not already instituted, and including the exercise or the forbearance from the exercise of

any right or any official power or duty; and

(g) any offer, undertaking or promise, whether conditional or unconditional, of any gratification within the meaning of any of the preceding paragraphs (a) to (f);

(g) s 23(1) and (2) of the MACC Act:

23 Offence of using office or position for gratification.

(1) Any officer of a public body who uses his office or position for any gratification, whether for himself, his relative or associate, commits an offence.

(2) For the purposes of subsection (1), an officer of a public body shall be presumed, until the contrary is proved, to use his office or position for any gratification, whether for himself, his relative or associate, when he makes any decision, or takes any action, in relation to any matter in which such officer, or any relative or associate of his, has an interest, whether directly or indirectly.

ISSUES FOR DETERMINATION OF COURT

[8] The main issue for determination of this court culled from the pertinent affidavits filed herein and the submissions by the parties pertaining to this application, these are as follow:

(a) whether the impugned charges ought to be set aside because they are defective in substance and form, and bad in law as they contravene:

(i) ss 152 and 154 of the Criminal Procedure Code ('the CPC');

(ii) ss 3 and 23 (1) of the MACC Act 2009; and arts 5 and 8 of the Federal Constitution.

(b) whether the defective charge is curable under ss 156 and 422 of CPC? and

(c) whether it is justifiable for this court to invoke its inherent jurisdiction to allow the application?

[9] The grounds of application canvassed by the appellant in encl 1:

Alasan-alasan permohonan ini adalah kerana kedua-dua pertuduhan adalah:

(i) bercanggahan dengan s 152 Kanun Tatacara Jenayah (KTJ) kerana dua pertuduhan tersebut tidak mendedahkan suatu kesalahan di bawah s 23(1) Akta SPRM 2009; dan

(ii) bercanggahan dengan s 154 KTJ kerana dua pertuduhan tersebut kekurangan dalam butir-butir dan tidak langsung menyatakan bagaimana kesalahan s 23(1) Akta SPRM 2009 tersebut dilakukan.

(iii) Kedua-dua Pertuduhan tidak mendedahkan kesalahan yang dilakukan oleh Pemohon yang bercanggah dengan Akta SPRM 2009.

(iv) Suapan yang dijadikan asas kedua-dua pertuduhan tidak termasuk di dalam definasi suapan dibawah Seksyen 3 Akta SPRM 2009.

(v) Kedua-dua pertuduhan melanggar Perkara 5 dan 8 Perlembagaan Persekutuan.

(vi) Kuasa Sedia Ada Mahkamah patut dan boleh digunakan oleh Mahkamah yang Mulia kerana terdapat keadaan luar biasa kerana pertuduhah dibawah seksyen 23(1) Akta SPRM 2009 adalah penindasan dan penyalahgunaan proses Mahkamah terhadap Pemohon.

SUBMISSIONS OF APPLICANT

[10] The applicant's counsel, Mr Iskandar Putra Ishak submitted that the charges are defective by reason of no particularisation of the offence committed or charged with, contrary to s 154 of the Criminal Procedure Code ('the CPC').

[11] In short, he averred that the respondent failed to set out sufficient particulars of the nature and manner in which the applicant had purportedly committed the offence under s 23(1) of the MACC Act.

[12] The particulars are absolutely necessary in view of the wording of s 23(2) of the MACC Act which reads as follows:

> (2) For the purposes of subsection (1), an officer of a public body shall be presumed, until the contrary is proved, to use his office or position for any gratification, whether for himself, his relative or associate, when he makes any decision, or takes any action, in relation to any matter in which such officer, or any relative or associate of his, has an interest, whether directly or indirectly.

[13] He contended that the first charge merely mentioned 'menggunakan jawatan kamu' and failed to give sufficient particulars of how did the applicant uses his position: Did he take any action? Did he make any decision? What did he do? This is the pertinent question in any criminal trial.

[14] Similarly, the wordings used in second charge that is 'menggunakan jawatan kamu untuk satu suapan bagi diri kamu sendiri, iaitu pembayaran berjumlah RM5,800 kepada Serba Setia bagi kerja-kerja 'supply and install security door' di kediaman persendirian kamu' are also lacking in particulars.

[15] Mr Ishak argued that both charges do not give the applicant sufficient notice of the offence that he is charged with. During the tenure as a Director General of Labuan Financial Authorities, the applicant has taken or made

hundreds, if not thousands, decisions. the applicant is left to guess and speculate as to how he has allegedly abused his position, if any, — did the applicant 'make any decision' or 'take any action' and in relation to 'what matter'.

[16] By being very general and ambiguous, the respondent to prepare his case properly, as he is not able to instruct his counsel what was his action or decision that tantamount to crime. Consequently, the applicant is denied of the opportunity to defend himself and is unable to give proper instructions to his counsel and is severely handicapped in the preparation of his defence.

[17] It was further argued that the lack of particularisation in these charges contravenes the provision of s 154 of the CPC which reads:

> 154 When manner of committing offence must be stated
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> When the nature of the case is such that the particulars mentioned in sections 152 and 153 do not give the accused sufficient notice of the matter with which he is charged, the charge shall also contain such particulars of the manner in which the alleged offence was committed as will be sufficient for that purpose.

[18] Section 154 of the CPC clearly makes it a mandatory for the charge of an abuse of position under s 23(1) of the MACC Act to contain particulars of the nature and manner in which the applicant had purportedly committed the offence.

[19] Further, the applicant's counsel submitted that the lack of particularisation in the charges deprives the applicant of his constitutional protected right to be informed as enshrined under art 5 of the Federal Constitution and his right of equal protection under art 8 of the Federal Constitution, and he is also denied of his right for fair trial. In support of contention, the applicant's counsel relied on numbers of decided cases including *Rosli bin Yusof v Public Prosecutor* [2021] 4 MLJ 479.

[20] In order to strengthen their contentions, the applicant compared the present case with other cases related to an offence under the same section; *Public Prosecutor v Dato' Sri Mohd Najib bin Hj Abd Razak* [2020] 11 MLJ 808; [2020] 8 CLJ 319, *Public Prosecutor v Arul Kanda a/l Kandasamy and another case* [2023] 10 MLJ 342; [2023] 3 CLJ 770; *Siti Aishah bt Sheikh Abd Kadir v Public Prosecutor* [2013] 6 MLJ 86; [2014] 1 CLJ 1058; *Thomas @ Severinus bin Kandadi v Public Prosecutor* [2009] 7 MLJ 803; [2009] 7 CLJ 561.

[21] The main authority relied on by the applicant is the High Court case of *Mahiaddin Md Yassin v Public Prosecutor* [2023] MLJU 2008; [2023] 8 CLJ

A 756. It was argued that this case is most pertinent and relevant to the present case because it involves similar charge for offence of abuse of position under s 23(1) of the MACC Act.

B **[22]** Similar to the present case, In *Mahiaddin*, all the four charges preferred against Tan Sri Muhyddin, the applicant in that case merely mentioned 'Menggunakan jawatan' without particularising the manner of the abuse of position and what the applicant did that considered as abuse of position under s 23(1) of the MACC Act.

C **[23]** Muhammad Jamil, the High Court judge of Kuala Lumpur ruled that the manner of how the abuse of position done need to be particularized in the charge. Since there was no such particulars contained in the charge, no sufficient notice given to enable the applicant to prepare his defence. Hence D those charges were declared defective.

[24] Apart from that, the applicant submitted that the gratification mentioned in the two charges are defective as it does not fall within 'interest in property' as defined under s 3 of the MACC Act.

E **[25]** The applicant further submitted that lacking in particulars is causing the applicant in this present case, a severe lack of injustices, where the court is justifiable to invoke its inherent jurisdiction and it is only High Court that have the power to invoke inherent jurisdiction. These charges, however, are not F curable under s 156 and/or s 422 of the CPC as objection in relation to such deficiency has been raised prior to the commencement of the trial.

SUBMISSIONS OF RESPONDENT

G **[26]** At the outset, the respondent highlighted that it is incumbent for the court to decide on the issue of abuse of process first as laid down in the Federal Court case of *Kerajaan Malaysia v Mat Shuhaimi bin Shafiei* [2018] 2 MLJ 133; [2018] 3 CLJ 1 and also *Ahmad Zubair @ Ahmad Zubir bin Hj Murshid* H *v Public Prosecutor* [2014] 6 MLJ 831; [2014] 9 CLJ 289.

[27] In essence, the Federal Court ruled that it is important for the court to determine as a preliminary issue whether an application is an abuse of process or not before moving forward to examine its merit and the court may exercise I its inherent power if there is exceptional circumstances.

[28] In view of the aforesaid, the respondent submit that the remedy of groundless or defective charge is available under s 173(g) of the Criminal Procedure Code that provides for the procedures in summary trial.

[29] The respondent further submitted that the court shall hear all the evidence produced before the court before any decision can be made. An accused is only entitled to an order of discharged an acquittal without calling his defence in circumstances where the court finds that the prosecution had failed to prove a prima facie case after making a maximum evaluation on the evidence produced.

[30] Having said so, this application is an abuse of process as the applicant did not shows anything out of the ordinary or exceptional circumstances regarding this application that warrant this court to exercise its inherent power.

[31] The respondent also submitted that the charge against the applicant is in order and satisfies all the requirement laid down in ss 152, 153 and 154 of the CPC. The respondent argued that s 154 only provides that the manner must be stated if the particulars in both ss 152 and 153 do not give accused the sufficient notice. In contrary, the charges preferred against the applicant gives the sufficient notice to the applicant as to the offences he is charged with under s 23(1) of the MACC Act.

[32] The respondent averred that based on the wordings in the charges, all the requirements laid down in ss 152 and 153 of the CPC and also the elements of the offence committed under s 23 of the MACC Act 2009 had already been satisfied with. Therefore, the facts stated in both of the charges are not misleading as it already mentioned his position, for whom the gratification is for, the manner and gratification involved, the specific works done regarding the offences he is charged with. It brings the sufficient notice to the applicant as to the offences he is being charged with in preparing his defence.

[33] The respondent further argued that in the offence charged in the present case involved 'mengambil apa-apa tindakan, berhubungan dengan apaapa perkara' and thus, the particulars in the charge already gives sufficient notice to the applicant. The two charges do disclosed the offence of s 23 that he is charged with. As such, it has satisfied all the requirements laid down in ss 152 and 153 of the CPC.

[34] The respondent further argued that it is a series of conduct of the applicant that led to the offence committed. This is evidential and will be elaborated and presented during trial to proof the prosecution's case.

[35] The respondent also argued that all the elements for the offence under s 23(1) of the MACC Act 2009 had already mentioned in both charges. Thus, the charges already satisfied all the requirements under ss 152 and 153 of the CPC. Section 23(1) MACC Act is a complete offence without having to rely on the legal presumption section under s 23(2) of the MACC act.

[36] It is up to the prosecution during full trial to choose and highlight the evidence provided by the prosecution's witnesses whether the applicant had made a decision or taken any action to activate the legal presumption under s 23(2) of the MACC Act in order to prove the element of 'menggunakan jawatan' in s 23(1) of the same Act.

[37] Both of the charges clearly mentioned all the necessary facts and relevant details that is required under the law namely the time, place and the person the offence is related with is not defective in law and gives the sufficient notice to the applicant as to the offences he is charged with. Therefore, it does not caused confusion nor misled the applicant in his defence.

[38] The respondent contended that the present case is distinguishable from *Mahiaddin Yasin* because in the present facts the wordings '... telah menggunakan jawatan kamu untuk satu suapan bagi diri kamu sendiri, iaitu pembayaran berjumlah ...' were mentioned in the charge. Whereby in the case of *Mahiaddin Yasin*, the wordings is not as specific. There are differences in the wordings itself so as to portray the charge to complete the element of the offence under s 23(1) of the MACC Act. Further, the latter is still pending appeal.

[39] In respect of the applicant's contention that the gratification in the charges was defective, the respondent argued that this is a misdirection on the part of the applicant.

[40] The respondent submitted that the gratification mentioned in the charges fall under the definition of property or interest in property being property of any description whether it is movable or immovable. s 3 of the MACC Act defines 'property' as 'real or personal property of every description, including money, whether situated in Malaysia or elsewhere, whether tangible or intangible, and includes an interest in any such real or personal property'.

[41] The charges explicitly stated that: '... pembayaran berjumlah RM20,225 kepada Asas Jaya Enterprise bagi kerja-kerja membina dan menyiapkan tandas, membersihkan stor, memasang pintu serta kerja-kerja yang lain di kediaman persendirian kamu ...'. Both charges explicitly mentioned that the works were done in the applicant's private residence. And thus, it falls under the literal definition of 'immovable property' that is something that the fixture of doors and all the other works done to the applicant's private resident is considered as immovable property as the private residence of the applicant itself is a property that is firmly fixed into the grounds and cannot be moved. When the works and installation is completed, then the doors and any other works done to his private residence is fixed into his private

residence and became one of his properties.

[42] Having said so, there is no ambiguity in the description of the gratification in both of the charges and it does fall under the definition of gratification in s 3 of the MACC Act.

ANALYSIS AND FINDINGS

Inherent power of court

[43] At the outset, it is a trite law that High Court has inherent power to set aside and quash or stay the charges permanently in order to suppress any abuses of its process and to defeat any attempted thwarting of its process.

[44] This has been thoroughly addressed in *Ahmad Zubair* where the Federal Court held:

> (26) Although we accept the forgoing principles stated above as the correct statement of the law, we must caution ourselves that the inherent powers of the court must be exercised in exceptional circumstances to prevent undue oppression and abuse of the process of the court ...

[45] The Federal Court further emphasised:

> As such we may hasten to add that the inherent jurisdiction of the court is therefore not as wide as it seems to be. Much depends on the facts and circumstances and clearly the court cannot exercise its inherent jurisdiction in respect of any matter covered by specific provisions of the law or if its exercise would infringe any specific provisions of the law.

[46] This court may invoke such prerogative powers in rare instances where it is right to do justice to the accused (see Supreme Court decision in *Karpal Singh & Anor v Public Prosecutor* [1991] 2 MLJ 544; [1991] 2 CLJ 1458; [1991] 1 CLJ Rep 183).

Issue A: Whether the impugned charges are defective and bad in law

Contravention with ss 152 and 154 of the CPC and s 3 and 23 of the MACC Act

[47] In regard to issue in para 13(a)(i) and (ii) above, I will deal with them simultaneously as they relate to each other.

[48] It is trite that a charge should be so drawn that the accused should know exactly and with particularity the case which has to meet and be prepared to answer the charges as best he may.

A **[49]** Section 152 read together with s 153 of the CPC requires the charge to state the offence that the accused is charged with, the particulars as to time, place and person the offence is related with so as to give the accused a reasonable and sufficient notice of the matter and offence he is charged with.

B **[50]** Where the particulars in both ss 152 and 153 of CPC do not give accused the sufficient notice of the matter with which he is charged, s 154 makes it mandatory for particulars of the manner in which the alleged offence was committed to be mentioned in the charge.

C **[51]** Coming back to the instant application, it is crystal clear that the particulars as to the time, place and person the offence is related with is set out clearly in both charges. The charge also clearly stated that the applicant is charged with an offence under s 23(1) of the MACC Act punishable under s 24 D of the same Act.

[52] The question is whether these particulars give the applicant sufficient notice of the matter with which he is charged.

E **[53]** The respondent submitted that the impugned charges gives sufficient notice as to the offence committed by referring to the element stated in s 23(1) of the MACC Act. The facts stated in both of the charges are not misleading as it already mentioned his position, for whom the gratification is for, the manner and gratification involved. F

[54] Having perused the impugned charges, I am inclined to agree with the respondent.

G **[55]** Essentially, the first charge has stated that the applicant as the Head of Director of LFSA has uses his office or position for any gratification for himself by payment of RM20,225 to Asas Jaya Enterprise for 'bagi kerja-kerja membina dan menyiapkan tandas, membersihkan stor, memasang pintu serta kerja-kerja yang lain' at his private residence. Whilst second charge stated that H the applicant as the Head of Director of LFSA has uses his office or position for any gratification for himself by payment of RM5,800 to Serba Setia for 'supply and install security door' at his private residence.

[56] As far as the question whether the gratification in the aforesaid charges I are gratification under the MACC Act, I am with the respondent that they fall under 'property or interest in property being property of any description whether movable or immovable' under limb (a) of s 3 of the MACC Act.

[57] Section 3 of the MACC Act defines 'property' as 'real or personal

property of every description ...' whether tangible or intangible, and includes an interest in any such real or personal property.

[58] The *Oxford English Dictionary* defined 'immovable' as something that cannot be moved physically; firmly fixed; incapable of movement.

[59] In the upshot, as correctly submitted by the respondent, the fixture of doors and all the other works done to the applicant's private resident is immovable as the residence itself is a property that is firmly fixed into the grounds and cannot be moved. When the works and installation is completed, then the doors and any other works done to the applicant's private residence is fixed into his private residence and became one of his properties.

[60] The applicant argued that these charges are in contravention of s 154 of the CPC as they did not give sufficient notice to the applicant since they did not state whether the applicant have made any decision or doing any action and for what matter as stated in s 23(2) of the MACC Act. I am of the opinion that this argument devoid of merit.

[61] In this regard, I am of the opinion that *Dato' Sri Mohd Najib bin Hj Abd Razak v Public Prosecutor* [2022] 1 MLJ 137; [2022] 1 CLJ 491 is instructive. In this case, the Court of Appeal discussed the elements to be proved for offence under s 23(1) of the MACC Act in length:

> *The two main elements that must be proved for an offence under s 23(1) are first, the accused was an officer of a public body, and second, the accused had used either his office or position for gratification for himself or his relative or associate*. However, in the present case the charge is framed such that the appellant is said to have used his office or position for gratification for himself.
>
> The First Element — Officer Of A Public Body
>
> [93] Section 3 of the MACC Act defines an 'officer of a public body' as follows:
>
> > 'officer of a public body' means any person who is a member, an officer, an employee or a servant of a public body, and includes a member of the administration, a member of Parliament, a member of a State Legislative Assembly, a judge of the High Court, Court of Appeal or Federal Court, and any person receiving any remuneration from public funds, and, where the public body is a corporation sole, includes the person who is incorporated as such.
>
> ...
>
> *Second Element — Use Of Position For Gratification*
>
> [95] *To establish the second element of s 23 the prosecution must prove that the appellant had used his position for gratification whether for himself, his relative or associate*. In this regard, the prosecution submits that it has successfully proved this second element by clear evidence *and by relying on the presumption found in s 23(2) of the MACC Act,*

A *which provides for a rebuttable statutory presumption that an accused is presumed to have used his position for gratification when he makes any decision or takes any action in relation to any matter in which he has an interest, whether directly or indirectly.*

[96] *It is pertinent to highlight that for the purpose of proving the second element of 'using office or position for any gratification', the prosecution can rely on the rebuttable statutory* B *presumption under s 23(2) of the MACC Act …*

[101] *Therefore, upon proof of the basic facts as stated earlier, the presumption under s 23(2) of the MACC Act will apply and the accused is legally presumed to have used his office or position for gratification (effectively the whole of the offence under s 23(1)). It* C *then falls on the defence to rebut the presumption on a balance of probabilities.*

[102] *However, if the prosecution failed to prove the basic facts, the presumption under s 23(2) of the MACC Act will not have any application, which consequently will not only affect the second element of 'using office or position for any gratification' in s 23(1) of the MACC Act, but the whole of the offence under s 23(1) will fall, unless of course if the* D *prosecution adduces direct evidence establishing the fact of the accused using his office or position for gratification.*

[62] Applying *Dato' Sri Najib*, s 23(1) is the offence provision while s 23(2) is the presumption provision. The respondent may or may not invoke the E rebuttable presumption under s 23(2) of the MACC Act.

[63] However, if the respondent wishes to invoke the section, which is not the case in this case, the respondent must prove that the applicant uses his F position for such gratification by making any decision or taking any action in relation to the matter in which he has an interest, whether directly or indirectly.

[64] The applicant relied on the High Court case of *Mahiaddin*. It is pertinent to note that the High Court's decision was overturned on G 28 February 2024 by the Court of Appeal and the charges were reinstated. Unfortunately, the ground of judgment was not yet available.

[65] The ruling of the Court of Appeal is:

H This is our unanimous decision. The Appellant has contended that a political society comes within the definition of associate under s 3 of the MACC Act. It is further argued by the Appellant that a society falls within the definition of organisation under s 3(c) of the same Act. We agree with this submission. We find no merit in the respondent's submission because the word 'society' is not mentioned in s 3, therefore a society cannot come within the definition of 'associate'. I

In our view, the ordinary meaning of organisation is a group formed for a particular purpose. As a society is also a group formed for a particular purpose, it would fall within the definition of organisation.

It follows that Bersatu, a political society comes within the definition of associate as defined under s 3 of the MACC Act. Hence, we are of the view that the learned High Court judge had erred in law when he ruled that the four charges did not disclose any offence known to law.

On the second issue raised by the appellant that the charges are not defective, we accept their submission. In our view, the four charges are clear and unambiguous. As such, there is no necessity on the prosecution to set out the manner or give further particulars as to how the offence was committed.

We therefore allow the appeal and set aside the High Court's order. The case is remitted to Sessions Court Kuala Lumpur for the next course of action. Case fixed for mention on 4 March 2024 at the Sessions Court Kuala Lumpur.

[66] Nevertheless, I am of the opinion that the case is distinguishable from the case in hand as in former the charges did not disclose any offence under s 23(1) of MACC Act.

[67] In *Mahiaddin Md Yassin*, Muhammad Jamil Hussin J held:

[38] Isu dalam alasan (i) ialah sama ada pertubuhan yang didaftarkan di bawah s 7 Akta Pertubuhan 1966 adalah sekutu sebagaimana takrif di bawah s 3 Akta SPRM. Jika bukan, maka empat pertuduhan tersebut tidak mendedahkan suatu kesalahan di bawah s 23(1) *Akta SPRM.*

...

[59] Pada pandangan saya, perkataan 'organisasi' dalam takrif 'sekutu' di perenggan (c) s 3 Akta SPRM tidak termasuk suatu pertubuhan.

[60] Suapan bagi sekutunya PPBM adalah suatu elemen kesalahan bagi kesalahan di bawah s 23(1) Akta SPRM. PPBM suatu pertubuhan bukan sekutu seperti ditakrifkan di bawah s 3 Akta SPRM.

[61] Empat pertuduhan tersebut yang menyatakan suapan bagi sekutunya PPBM tidak mendedahkan suatu kesalahan di bawah s 23(1) Akta SPRM.

[62] Jelas kepada saya pemohon dituduh dengan suatu kesalahan yang tidak diperuntukkan oleh undang-undang (*offence unknown in law*).

[63] Empat pertuduhan tersebut cacat kerana tidak mendedahkan suatu kesalahan di bawah s 23(1) Akta SPRM.

[68] Another issue raised in *Mahiaddin Md Yassin* is that the charges are defective for lack of particulars required under s 154 of the CPC.

[69] It appears that in arriving to his decision, the learned High Court judge referred to two other cases for offence under s 23(1) of MACC Act in which the charge stated the manner of offence committed ie by making decision or taking action:

[83] *Isu dalam alasan (ii) ialah sama ada empat pertuduhan tersebut memberikan pemohon notis mencukupi perkara yang dia dituduh. Jika tidak, maka empat pertuduhan tersebut hendaklah juga mengandungi butir-butir cara kesalahan dilakukan*.

[84] Saya perturunkan di sini pertuduhan bagi kesalahan sama di bawah s 23(1) Akta SPRM dalam dua kes yang dirujuk kepada mahkamah ini oleh peguam pemohon.

[85] Dalam kes *Public Prosecutor v Dato' Sri Mohd Najib bin Hj Abd Razak* [2020] 11 MLJ 808; [2020] 8 CLJ 319 (Mahkamah Tinggi) pertuduhan bagi kesalahan sama di bawah s 23(1) Akta SPRM adalah dirangka seperti berikut:

> Bahawa kamu antara 17 Ogos 2011 dan 8 Februari 2012, di Pejabat Perdana Menteri, Presint 1, Putrajaya, di dalam Wilayah Persekutuan Putrajaya, sebagai seorang pegawai badan awam, iaitu Perdana Menteri dan Menteri Kewangan Malaysia, telah menggunakan jawatan untuk suapan bagi diri kamu berjumlah empat puluh dua juta Ringgit Malaysia (RM42,000,000.00) apabila kamu telah terlibat dalam keputusan bagi pihak Kerajaan Malaysia untuk memberikan jaminan kerajaan bagi pinjamanpinjaman berjumlah empat billion Ringgit Malaysia (RM4,000,000,000.00) daripada Kumpulan Wang Persaraan (Diperbadankan) kepada SRC International Sdn Bhd, oleh yang demikian kamu telah melakukan kesalahan di bawah s 23 Akta Suruhanjaya Pencegahan Rasuah Malaysia 2009 [Akta 694] yang boleh dihukum di bawah s 24 Akta yang sama.

[86] Dalam kes *Public Prosecutor v Arul Kanda a/l Kandasamy and another case* [2023] 10 MLJ 342; [2023] 3 CLJ 770, pertuduhan bagi kesalahan sama di bawah s 23(1) Akta SPRM adalah dirangka seperti berikut:

> Bahawa kamu di antara 22 Februari 2016 dan 26 Februari 2016, di Kompleks Jabatan Perdana Menteri, Pusat Pentadbiran Kerajaan Persekutuan, di dalam Wilayah Persekutuan Putrajaya, sebagai seorang pegawai badan awam iaitu Perdana Menteri Malaysia dan Menteri Kewangan Malaysia telah menggunakan kedudukan kamu untuk mendapatkan suapan bagi diri kamu sendiri, iaitu, perlindungan daripada tindakan sivil atau jenayah berkaitan peranan kamu di dalam perjalanan operasi Syarikat 1 Malaysia Development Berhad (1MDB) dengan cara mengambil tindakan mengarahkan Laporan Pengauditan 1MDB yang telah dimuktamadkan oleh Ketua Audit Negara dipinda seperti di Lampiran A sebelum laporan berkenaan dimuktamadkan semula dan dibentangkan kepada Jawatankuasa Kira-Kira Wang Awam Negara (PAC), yang mengenainya kamu secara langsung mempunyai kepentingan, oleh yang demikian kamu telah melakukan suatu kesalahan di bawah s 23(1) Akta Suruhanjaya Pencegahan Rasuah Malaysia 2009 (Akta 694) yang boleh dihukum di bawah s 24(1) Akta yang sama.

[87] *Dalam dua kes di atas pertuduhan bagi kesalahan sama di bawah s 23(1) Akta SPRM mengandungi butir- butir cara kesalahan dilakukan iaitu telah terlibat dalam keputusan bagi pihak Kerajaan Malaysia berhubung suatu perkara (Public Prosecutor v Dato' Sri Mohd Najib Hj Abd Razak) dan dengan cara mengambil tindakan*

berhubung suatu perkara (Public Prosecutor v Arul Kanda Kandasamy and another case).

[88] *Mengapa dalam kes pemohon empat pertuduhan bagi kesalahan sama di bawah s 23(1) Akta SPRM tidak mengandungi butir-butir cara kesalahan dilakukan sama ada pemohon membuat keputusan atau mengambil tindakan dan berhubung perkara apa. Ini menimbulkan tanda tanya yang serius. Seolah-olah pihak pendakwaan tidak pasti apakah kes yang ingin dibawa terhadap pemohon, membuat keputusan atau mengambil tindakan dan berhubung perkara apa*.

[89] TPR tidak merujuk mahkamah ini kepada mana-mana kes untuk menyokong hujahan bahawa bagi kesalahan sama di bawah s 23(1) Akta SPRM pertuduhan tidak perlu mengandungi butir-butir cara kesalahan dilakukan.

[70] The learned High Court judge also referred to *Dato' Sri Mohd Najib*:

[95] Kes *Dato' Sri Mohd Najib bin Hj Abd Razak v Public Prosecutor* [2022] 1 MLJ 137; [2022] 1 CLJ 491 (Mahkamah Rayuan) yang dirujuk kepada mahkamah ini oleh TPR adalah relevan. Pertuduhan bagi kesalahan sama di bawah s 23(1) Akta SPRM dan pertuduhan menyatakan cara kesalahan dilakukan iaitu telah terlibat dalam keputusan bagi pihak Kerajaan Malaysia berhubung suatu perkara tetapi tidak menyatakan kepentingan tertuduh dalam keputusan itu. Mahkamah Rayuan bersetuju dengan Mahkamah Tinggi bahawa tiada keperluan undang-undang untuk menyatakan dalam pertuduhan kepentingan tertuduh dalam keputusan itu.

[96] Ini berbeza dengan kes pemohon. Empat pertuduhan tersebut langsung tidak menyatakan cara kesalahan dilakukan sama ada membuat keputusan atau mengambil tindakan dan berhubung perkara apa.

[97] Daripada kes *Dato' Sri Mohd Najib Hj Abd Razak v Public Prosecutor* (Mahkamah Rayuan) yang dirujuk kepada mahkamah ini oleh TPR, pertuduhan bagi kesalahan sama di bawah s 23(1) Akta SPRM menyatakan cara kesalahan dilakukan iaitu telah terlibat dalam keputusan bagi pihak Kerajaan Malaysia berhubung suatu perkara.

[98] Seperti dinyatakan di atas, kesalahan di bawah s 23(1) Akta SPRM adalah berkenaan pegawai badan awam yang menggunakan jawatan atau kedudukannya untuk satu suapan, sama ada bagi dirinya sendiri, saudaranya atau sekutunya.

[100] *Seksyen 23(1) Akta SPRM dibaca bersama-sama dengan s 23(2) Akta SPRM, pada pandangan saya, kesalahan menggunakan jawatan atau kedudukan untuk satu suapan, adalah berkenaan tertuduh membuat keputusan atau mengambil tindakan berhubung suatu perkara*.

[101] Saya tidak setuju dengan TPR bahawa cara pemohon menggunakan kedudukan tidak perlu dinyatakan dalam pertuduhan tetapi boleh dibuktikan melalui keterangan ketika perbicaraan. TPR tidak merujuk mahkamah ini kepada mana-mana kes autoriti untuk menyokong hujahan bahawa bagi sifat kes ini pertuduhan tidak perlu mengandungi butir-butir cara kesalahan dilakukan.

[102] Jika cara pemohon menggunakan kedudukan boleh dibuktikan melalui keterangan ketika perbicaraan seperti dihujahkan oleh TPR, ini tentunya

mendatangkan ketidakadilan kepada pemohon kerana tujuan suatu pertuduhan adalah untuk maklumkan pemohon kesalahan yang dilakukan supaya dia boleh menyediakan pembelaannya. Daripada empat pertuduhan tersebut yang tidak mengandungi butir-butir cara kesalahan dilakukan, pemohon tidak tahu sifat sebenar kesalahan yang dilakukan. Pemohon tidak berupaya untuk menyediakan pembelaan sewajarnya sebelum bermula perbicaraan.

[71] With due respect, I am of the opinion this is not the correct proposition of law. As enunciated by the Court of Appeal in *Dato' Sri Mohd Najib*, the respondent is not obliged to prove the element in s 23(2) of the MACC Act unless the respondent intends to rely on the rebuttable presumption under the section.

[72] Based on the aforesaid, I am of the opinion that the impugned charges have fulfilled the requirement of s 152 and s 153 of the CPC as well as s 3 and s 23(1) of the CPC. These charges are not defective in law and have given sufficient notice to the applicant as to the offences he is charged with.

[73] As such, the issue in para 8(a)(i) and (ii) ought to be answered in negative.

[74] Premised on this ground alone, it is proposed that the applicant's notice of motion in encl 1 ought to be dismissed.

Contravention with arts 5 and 8 of the Federal Constitution

[75] In respect to the issue in para 8(a)(iii), I reiterate the above discussion and of the opinion that there is no contravention of arts 5 and 8 of the Federal Constitution. Hence, this issue ought to be answered in negative too.

Issue B: Whether the defective charge is curable under ss 156 and 422 of the CPC

[76] As far as the issue in para 8(b) is concerned, it is trite that an error or omission in the particulars of an offence is curable as opposed to the error or omission in the ingredients of an offence.

[77] In this regard, I am inclined to agree with the respondent that the manner the applicant used his position, either by making decisions or taking actions in the charge, if any, is only an irregularity curable under s 156 of CPC and will not cause a miscarriage of justice to the applicant.

[78] As such, omission of the fact alone cannot conclude that the charge is defective in law. This matter is a question of fact and should be decided after this court hear the testimony of the witnesses and not based on affidavits.

[79] It is pertinent to note the Federal Court in *Ravindran a/l Ramasamy v Public Prosecutor* [2015] 6 MLJ 509; [2015] 3 CLJ 421 drew distinction between an error or omission in the ingredients of an offence, as opposed to an error or omission in the particulars of the offence:

> *the 'error' alluded to in s 156 of the CPC is the error in stating the offence or the particulars required to be stated in the charge, and not the error in stating the ingredients of an offence*. The important distinction, whether an error in stating the particulars or an error in stating the ingredients, must be drawn for the purposes of ss 156 and or 422 of the CPC. *This is because where it was an error or omission in stating the ingredients of an offence, it had been consistently held by the courts that the accused would have been misled and there must have been a failure of justice* ...
>
> *But in cases decided primarily under ss 156 and or 422 of the CPC, courts had refused to invoke those provisions where it was an error or omission in stating the ingredients of an offence*.

[80] Further, the errors or omissions in the charge is only an irregularity which cannot affect any decision unless it causes a miscarriage of justice as stated in s 422 of the CPC (see the Court of Appeal decision in *Mohd Haikal bin Mohd Khatib Saddaly & Ors v Public Prosecutor* [2009] 4 MLJ 305; [2011] 5 CLJ 369).

[81] In this instant case, with the court's permission, the prosecution at all material time during trial, have the rights to apply to the court to amend the charge.

Issue C: Whether it is justifiable for this court to invoke its inherent jurisdiction to allow the application?

[82] In regard to this issue, having said the above, it goes without saying that this is not the case that warrant this court to exercise its inherent power. Therefore, it ought to be answered in negative.

CONCLUSION

[83] In a nutshell:

(a) this court has inherent power to set aside and quash or stay the charges permanently. However, this power should not be used arbitrarily and it should only be used in certain cases to avoid oppression and abuse of the court's process and where it is right to do justice to the accused;

(b) the impugned charges preferred against the applicant have set out clearly the particulars as to the time, place and person the offence is related with and thus has fulfilled the requirements under ss 152 and 153 of the CPC and ss 3 and 23(1) of the MACC Act;

(c) s 23(1) is the offence provision while s 23(2) is the presumption provision. Only when the respondent wishes to invoke the rebuttable presumption under s 23(2) that he must prove that the applicant uses his position for such gratification by making any decision or taking any action in relation to the matter in which he has an interest, whether directly or indirectly;

(d) the impugned charges gives sufficient notice as to the offence committed by referring to the element stated in s 23(1) of the MACC Act. The facts stated in both of the charges are not misleading as it already mentioned his position, for whom the gratification is for, the manner and gratification involved. Therefore, they are not contradicting s 154 of the CPC;

(e) the gratification in this case caught within the definition under s 3(a) of MACC Act. In this regard, the fixture of doors and all the other works done to the applicant's private resident is immovable as the residence itself is a property that is firmly fixed into the grounds and cannot be moved. When the works and installation is completed, then the doors and any other works done to the applicant's private residence is fixed into his private residence and became one of his properties;

(f) as the applicant is given sufficient notice of the offence that he is charged with to enable him to prepare his defence, there is no contravention of arts 5 and 8 of the Federal Constitution;

(g) based on the aforesaid, the impugned charges are not defective in substance and form and not bad in law;

(h) any omission if any relating to the manner the applicant uses his position, either by making decisions or taking actions in the charge is only an irregularity curable under s 156 and/or s 422 of the CPC and will not cause a miscarriage of justice to the applicant;

(i) as such, omission of the fact alone cannot conclude that the charge is defective in law. This matter is a question of fact and should be decided after this court hear the testimony of the witnesses and not based on affidavits; and

(j) in this instant case, with the court's permission, the prosecution at all material time during trial, have the rights to apply to the court to amend the charge.

[84] Premised on the aforesaid, the applicant's application in encl 1 ought to be dismissed.

Application dismissed.

Reported by K Selvaraju